The
DOMINION OF CANADA
General Insurance Company

The Dominion of Canada General Insurance Company:

Written Submissions to the Standing Committee on Access to Information, Privacy and Ethics

February 2007

165 University Avenue, Toronto, Ontario M5H 3B9
Tel: (416) 362-7231 Toll fee: 1-800-268-8447 Fax: (416) 362-9918
Home Page: www.thedominion.ca

I. INTRODUCTION

Canadian owned and operated, The Dominion of Canada General Insurance Company ("The Dominion") is one of Canada's largest property and casualty insurance companies. Since 1887, when Sir John A. MacDonald became the company's first president, The Dominion has been committed to providing high quality car, home and business products and services. Ensuring the integrity of policyholders' personal information is a key component of our commitment to earning the goodwill of policyholders, brokers and employees. It is this commitment that underlines the concerns raised in our submission.

The Dominion has attentively contributed to the discussions leading up to the five year review of the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"). In response to the discussion paper issued by the Office of the Privacy Commissioner ("OPCC"), in July of 2006 (appended at Tab 1), The Dominion made a written submission to the OPCC on September 14, 2006 ("Sept. 14 submission"), which is appended at Tab 2. We have also read the transcript of the appearance of the Privacy Commissioner of Canada before this Committee on Monday, November 27, 2006, as well as the OPCC's written submissions to this Committee. We have reviewed the submissions of the Insurance Bureau of Canada ("IBC") and generally support the positions and recommendations set out therein.

In response to the OPCC, The Dominion wishes to raise the following issues requiring clarification or rebuttal:

(a) solicitor client privilege and the *Blood Tribe* case;
(b) publicity powers of the OPCC;
(c) respondent's right of appeal;
(d) consent;
(e) work product;
(f) transborder flows of information; and
(g) duty to notify of breach.

II. GENERAL COMMENTS REGARDING PURPOSE OF *PIPEDA* AND PROCESS ISSUES

A. PROCEDURAL MATTERS

Before discussing the above issues, we would like to draw your attention to certain procedural matters that we consider to be significant.

The OPCC discussion paper at Tab 1 was put on the OPCC website late July, 2006. No press release or notice was published to alert interested parties. Given the omnibus impact of *PIPEDA* and any proposed amendments, this review process demands public discourse and scrutiny.

We were surprised to learn, when the Commissioner was questioned by this committee, that only 63 responses were made to the OPCC discussion paper. A mere 42 submissions were made by an assortment of financial institutions, associations, law firms, industry and professional associations. The Dominion was one of the parties to respond. One would expect a more robust interest in the OPCC's positions in this review. Perhaps wider notice would accomplish that in the future.

During her oral submissions to this Committee, the Commissioner stated that a "resume" of the various submissions made is included in the OPCC's written report to the Committee. (Tab 4, p. 6) With respect, it is difficult for us to recognize The Dominion's positions in this "resume."

A final, but important, point to make is that we are accustomed to engaging in public policy discussions with all levels of government. Standard practice in the democratic process is that submissions made regarding public policy matters are a matter of public record and accessible to all. Our counsel's repeated requests made to the OPCC for copies of responses made to the July discussion paper have been refused. Our counsel did not receive any reason for this refusal.

B. LEGISLATIVE PURPOSE OF *PIPEDA*

It is of the utmost importance to be mindful of the purposive statement at section 3 of *PIPEDA*:

> The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

The legislators clearly intended that commercial interests and imperatives be balanced with the interests of individuals regarding the collection, use and disclosure of their personal information. This equation is fluid and must be responsive to the context, a principle which is repeatedly articulated in the legislation.

PIPEDA was primarily intended as a response to the distribution of personal information by electronic means. *PIPEDA* was and remains a very powerful expression of the importance of individual integrity in the context of the value of information and the ease with which it can be moved. The legislation was crafted in a general sense, and we presume this was deliberate. The legislators recognized that the statute would be applied to a very broad range of entities and contexts, and took great care to underscore the importance of exercising discretion when applying the principles to particular fact situations. Given this context, "reasonableness" must reference both the expectations of the public and the circumstances of businesses and other organizations.

III. DISCUSSION OF ISSUES

A. SOLICITOR CLIENT PRIVILEGE AND THE *BLOOD TRIBE* CASE

The Commissioner refers to the Federal Court of Appeal decision in the *Blood Tribe* case, provided in our materials at Tab 8, as creating a significant gap in her powers, "effectively allow[ing] organizations to shield information from our investigators with no independent verification that the documents in question do in fact contain certain information subject to solicitor client privilege." (Tab 4, p.2)

In the insurance industry, *PIPEDA* has created an opportunity for plaintiffs lawyers to use the statute as a sword. *PIPEDA* is being used to gain an unfair advantage in the litigation process by attempting to obtain information and documents that are reasonably withheld under one of several grounds of privilege: solicitor client privilege being one example. We must remember that solicitor client privilege stands as being almost sacrosanct.

Documents for which solicitor client privilege is claimed very often protect the interest of the policy holder, whose interest the company represents when defending the policy holder. It is our legal duty to protect the interests of our policy holders and this duty is one of utmost good faith. Releasing privileged documents to the Commissioner may require insurers to violate their duty of utmost good faith to their policy holders. Further, it is a fundamental expectation on the part of the policy holder that she will have the full opportunity to mount a strong defence.

We suggest that, unconstrained, the plaintiffs bar and other organized interests will continue to aggressively use *PIPEDA* to try to subvert the long and established practice of common law precedent and the codified rules of civil procedure.

The Dominion takes exception to the insinuation that we will use solicitor client privilege as a shield; the suggestion being that this will be done inappropriately.

Tribunals with the power to access documents protected by solicitor client privilege are constituted differently from the OPCC. For a more expansive discussion of this salient point, we direct you to the comments of Malone, J.A. in *Blood Tribe* at Tab 8, p.9 of our materials. We suggest that the scope of the Commissioner's investigatory powers and the nature of the Commission were not struck in error, but as a result of careful consideration by the legislators at the time.

The Commissioner stated that the Federal *Privacy Act* allows the Commissioner to "go beyond" solicitor client privilege; in effect, to pierce the veil. (Tab 4, p.6) The Commissioner's interpretation of the *Privacy Act* is not apparent. Furthermore, investigatory powers under the *Privacy Act* do not aid in determining the Commissioner's powers pursuant to *PIPEDA*.

B. PUBLICITY POWERS OF THE OPCC

The Commissioner has the power to publish OPCC decisions and to identify the parties. This power, when exercised, has the potential to significantly and negatively impact the reputation of a business enterprise, which, of course, is an essential asset. As the Commissioner states, the exercise of this power is discretionary, when she considers it to be in the public interest.

With respect, we submit that selective disclosure of the identity of parties is not consistent with the open court principle, which is the foundation of judicial and quasi-judicial processes. The OPCC operations and adjudications must be infused with a greater degree of accountability. When the Commissioner exercises her power to disclose information relating to the management practices of an organization, *PIPEDA* should be amended to require the Commissioner to publish full reasons for her decision, including the name of the complainant and the nature of the compliant. This would allow the named organization to properly respond to the complaint and lessen the risk of improper damage to an organization's reputation.

Currently, when a complaint is made to the OPCC about a particular organization, the OPCC is not required to provide the identity of the complainant or the actual complaint made. All information about the complainant is filtered by the Commissioner. In this environment, it is impossible for the organization to fully respond to the complaint. Where the OPCC publishes the identity of the organization, unfairness to the organization is exacerbated.

Under the current regime, stakeholders can only read summaries and conclusions of cases considered by the OPCC. The public is unable to access unfiltered facts or representations made by parties and cannot assess the manner in which the OPCC arrives at decisions. Because we do not have access to the OPCC's reasons, we do not know the standards the Commissioner applied. This can be corrected by clarifying the reach and power of the OPCC and the standards it enforces. Now, we struggle to nail Jello to a wall, an impossible task.

Access is a critical aspect of the open court system, and many administrative and quasi-administrative tribunals have adapted their practices in recent decades in order to increase transparency.

It is imperative that a working threshold be articulated and applied to the interpretation of when the public interest requires such disclosure. Such a significant power should not be left to the unfettered interpretation of the Commissioner. Ultimately, such clarity enhances the credibility of the decision making body, which bolsters the confidence of all participants in the process. Given that *PIPEDA* applies federally and affects every single Canadian, such a change would be regarded very positively and would enhance the effectiveness of the OPCC.

C. RESPONDENT'S RIGHT TO APPEAL

As the legislation stands, the complainant may appeal a finding of the Commissioner but the respondent has no clear statutory right of appeal. The rationale for this one-sided approach is unclear. The result may be the entrenchment of procedural and substantive unfairness. We recommend that the legislation be amended to allow the subject of the complaint made to the OPCC to appeal to the Federal Court, if that party is dissatisfied with the OPCC ruling.

D. CONSENT

The Dominion works with hundreds of independent insurance brokers from coast to coast. Each insurance broker typically represents two or more insurance companies, or markets, in their professional practice. They also represent thousands of clients, each with a customized insurance program, based on their individual lifestyle and needs. Insurance products are often modified and the third party service providers with whom both brokers and companies interact may change. These business decisions ensure the smooth operation and, ultimately, efficient service delivery to the consumer.

If consent was required to advise of each operational change, the result would bog down the system without adding any value. Many operational adjustments have no substantive impact on the nature and scope of consent. Defining the "whens", "whys" and "hows" as to when consent must be renewed would be government micro-management of free enterprise ***in extremis***. In fact, it would build additional delay and administrative burden, which, of course, would ultimately translate to a more costly product for the consumer.

Consumers accept that flexibility in terms of operating a business is a reasonable and necessary accommodation. The Dominion respectfully submits that the current system which allows the exercise of business and consumer judgment as to when additional information is required in order to make the consent meaningful, operates well and should not be changed.

E. "WORK PRODUCT" – WHAT IS IT?

We agree with the Commissioner, as stated in her written submission to the Committee, that the "work product" issue is a very complex issue. (Tab 5, p.24) However, we strongly disagree with approaching such a systemic and very important issue on a case-by-case basis. If we understand correctly, this is the method proposed by the Commissioner. Standards must be developed so that the public understands how the statute is being interpreted and applied. "Work product" may not be used in *PIPEDA*, but it is a well-entrenched and understood term of law, and the Commission has, in the course of deliberations, had to address this issue.

The determination of what constitutes work product, and the circumstances in which it must be disclosed to a complainant, is very complex. It goes to the heart of the operations of an insurance company.

Throughout the insurance process, from the initial underwriting assessment of an applicant through to the resolution of a claim, multiple documents are generated. Very often, such documents are a blend of personal information and aggregate information and analysis. The fact that a document may contain personal information does not mean that the document is about an individual and, therefore, is producible in the context of *PIPEDA*.

It is interesting that the commissioner states that the matter of determining what constitutes work product "doesn't come up very often in our complaints… this is not an issue that dominates our complaints." (Tab 4, p.11) Perhaps, but the matter of what constitutes work product is an issue that dominates the complaints and concerns regarding the conduct of the insurance industry.

This industry has developed efficient and accepted models of reporting and analyzing information that are accepted jurisprudentially. Very often, what we claim as work product is the synthesis of our intellectual capital – the equivalent of research and development in the pharmaceutical industry – in a document. We would agree to produce personal information, depending on the context of the request, but we cannot submit to an indiscriminate handover of all work product files requested.

Clarity can be added to *PIPEDA* by adopting the "work production information" approach in British Columbia's *Personal Information Protection Act*, as suggested by the IBC.

F. TRANSBORDER FLOWS OF INFORMATION

In stating the reasons for requesting the power for the OPCC to share information with other data protection authorities, the Commissioner makes the observation that "complaints do not always fit neatly within Canada's national borders." (Tab 5, p.31) Nor do business transactions stop at the 49th parallel.

As the Committee is aware, we are regulated nationally by the Office of the Superintendent of Financial Institutions ("OSFI"), and also at the provincial level. OSFI is very aware of the fact that many information service providers are located in the United States, and it has developed stringent outsourcing guidelines regarding the integrity of personal and other information that may flow across borders.

Any suggestion that we must obtain individual personal consent before moving information outside Canada is unrealistic. Business operations would be impeded significantly, if not stopped altogether.

On a related issue, the matter of obtaining consent during a merger or purchase/sale transaction is discussed further in our Sept. 14 submission. (Tab 2, p.5)

G. DUTY TO NOTIFY OF BREACH

In recent weeks, there has been heightened attention on the duty to notify individuals when their personal information has been compromised. Currently, there is no such requirement or clearly articulated standard, although it is good business practice to consider this remedy in appropriate circumstances.

The challenge, as noted by the Commissioner, is in developing standards and thresholds for triggering such a duty. Our view is that in instances of material or significant breach, where the integrity of the individual's personal information is compromised and there is a reasonable expectation that third parties may have had access, or have used, such personal information, then a duty to notify should be required. We would be pleased to work with the OPCC in developing appropriate standards.

III. CONCLUSION

The Dominion acknowledges the important role the Committee has in striking the delicate balance between protecting the privacy rights of individuals while ensuring organizations are able to conduct business and provide services efficiently and smoothly. Resolution of the issues we have raised have the dual effect of benefiting consumers and businesses. Consumers will benefit when businesses are able to provide services with fewer interruptions and confusion if *PIPEDA* is amended to increase clarity and establish reasonable standards where necessary.

It is our commitment to our policy holders that drives The Dominion's interest in privacy legislation. This commitment requires that we take the utmost care in protecting their privacy and preventing financial exposure to them; and we do so at a cost that they consider reasonable. Our commitment requires us to balance these interests. We appreciate the opportunity to share our views and provide business context to this important review of *PIPEDA*.